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Editor
Júlio César Bueno

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CONTENTS

PREFACE v
Júlio César Bueno

Chapter 1 INTERNATIONAL PROJECT FINANCE 1
Aled Davies and Andrew Pendleton

Chapter 2 COLLABORATIVE CONTRACTING 13
Owen Hayford

Chapter 3 ARGENTINA 22
Pedro Nicholson and María Lucila Seco

Chapter 4 BELGIUM 31
Rony Vermeersch and Mitch Windsor

Chapter 5 BRAZIL 45
Júlio César Bueno

Chapter 6 COLOMBIA 66
Carolina Ariza Zapata and Camilo A Marín Acosta

Chapter 7 GHANA 83
NanaAma Botchway and Akosua Achiaa Akobour Debrah

Chapter 8 QATAR 96
Andrew Jones, Zaher Nammour, Paul Prescott and Gabriel Olufemi

Chapter 9 SAUDI ARABIA 115
Ali Al Toukhi

Chapter 10 SOUTH AFRICA 126
Deon Govender

Chapter 11 SWITZERLAND 138
Thomas P Müller and Francis Nordmann

Chapter 12 UNITED KINGDOM 148
Munib Hussain and Yi Ming Chan

Chapter 13 UNITED STATES 161
Henry Scott and Miguel Duran

Chapter 14 URUGUAY 183
Federico Formento

Chapter 15 UZBEKISTAN 197
Shukhrat Yunusov, Asol Iskhaeva and Latofat Rakhmanova

Appendix 1 ABOUT THE AUTHORS 211
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 221

PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.

Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice, and I would like to thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in several countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global, and that what is regional is of no importance. Many thanks to all the authors and law firms that graciously agreed to participate.

Finally, as we all hope to have reached the end of the most challenging phase of the covid-19 pandemic, I dedicate this book to all victims, their families and friends.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
June 2022

Chapter 10

SOUTH AFRICA

Deon Govender[1]

I INTRODUCTION

Project finance has been the backbone for long-term financing of capital-intensive projects within South Africa for close to 25 years. The status quo is likely to be maintained in the foreseeable future, primarily as a result of the South African government committing to partner with the private sector, multilateral development banks and development finance institutions to augment their funding of infrastructure projects.[2]

Local and international commercial banks participate in South African project finance transactions alongside multilateral and bilateral development finance institutions. The funding sources for project finance transactions have also included major South African life insurers, export credit agencies and private equity funds; however, private equity funding of infrastructure projects remains at an early stage of development relative to other infrastructure funding sources.

II THE YEAR IN REVIEW

During 2021, the South African construction sector experienced investment decline. The year-on-year decline in investment in construction works was -2.8 per cent. In addition to the continued impacts of the covid-19 pandemic, the key factors for this decline were civil unrest, weak business and investor confidence, government's constrained resources and policy uncertainty.

Arguably, policy uncertainty has been the biggest detractor from investment flows. In recent years, political uncertainty in South Africa has been heightened by the ruling party's proposed amendment of the Constitution of the Republic of South Africa to allow for expropriation of land without compensation. Although the vote to approve this proposed amendment failed to carry in Parliament, many fear that there may be renewed efforts to introduce such legislation in Parliament in the near future.

In the energy sector, one of the key positive developments in the year under review was the South African government's appointment of preferred bidders under its risk mitigation independent power producer procurement programme (RMIPPPP) and Bid Window 5 of its renewable energy independent power producer procurement programme (REIPPP).[3] Under

1 Deon Govender is of counsel at Covington & Burling (Pty) Ltd.

2 See South Africa's Budget Review 2021.

3 The appointment under the REIPPPP was made under Bid Window 5 of that programme.

RMIPPPP and Bid Window 5 of REIPPPP, the South African government will procure a total of 4,445MW, largely from independent power producers funded through blended finance sources.

Such procurement is seen by many as a significant step towards closing out the country's electricity supply gap, which has resulted in sustained rolling blackouts. Another potential source of additional electricity to address the electricity supply gap is the government's exemption of companies from licensing embedded generation projects where the projects in question have a generation capacity of less than 100MW.[4]

Other key positive developments in the country include the South African government's establishment of the 100 billion rand Infrastructure Development Fund, which seeks to catalyse up to 1 trillion rand of blended finance. In the water and sanitation sector, the South African government has committed to spending 18 billion rand to support water and sanitation public–private partnerships (PPPs).

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

A key tenet of South African project finance is limited recourse to the project sponsors and apportionment of project risks among the project company's counterparties under the various project documents. The project company is typically structured as a single-purpose insolvency remote special purpose vehicle (SPV). There are some particularities in relation to security structures supporting South African project financings; these are discussed in Section V.

ii Documentation

Most publicly procured infrastructure projects are anchored on a concession or a PPP agreement between a government institution responsible for the institutional function being outsourced and the relevant concessionaire (in the case of a concession agreement) or private party (in the case of a PPP agreement). In addition to PPPs being used to outsource an institutional function, the PPP regulatory framework may also be used to grant rights of use in state property to a private party.

Since the establishment of the PPP regulatory framework in 1999, there has been a sharp decline in the number of concession agreements entered into by government institutions. However, in 2021, the South African government vowed to revive PPPs, particularly in relation to water and sanitation.

REIPPP (like RMIPPPP) does not fit squarely within these public procurement categories. With regard to REIPPP, public procurement of electricity is undertaken by the Department of Mineral Resources and Energy; however, the independent power producers appointed as preferred bidders pursuant to the public procurement process ultimately enter into power purchase agreements (PPAs) with Eskom for the supply and purchase of the procured electricity. Eskom's payment obligations under the relevant PPAs are underwritten by the National Treasury in terms of a separate implementation agreement. Put-and-call option agreements generally do not feature in South African public procurement.

4 The capacity has previously been set at 1MW.

Typically, the SPV will enter into construction and operation and maintenance (O&M) contracts for the construction and operation of the power plant. Other key project documents include offtake agreements (e.g., the PPA under REIPPP), key input supply agreements (e.g., coal, limestone and water supply agreements for coal-fired power stations), real estate agreements (for the purchase or lease of the project site), licence and technology support agreements, shareholder and equity funding agreements, and finance documents.

The finance documents usually comprise either a common terms agreement or a facility agreement (or both), hedging documentation, an intercreditor agreement, security documentation (discussed in Section V) and direct agreements, which grant to lenders to the project rights under key project documents such as the real estate, key supply and offtake contracts. Credit enhancement agreements, such as limited shareholder corporate guarantees and engineering, procurement and construction (EPC) and O&M contractor parent guarantees, are often required by lenders to bolster the project's security package.

iii Delivery methods and standard forms

South African construction contracts embrace a wide spectrum of delivery methods, from design-build to EPC contracts and many variants in between. With regard to construction services, engineering-procurement-construction-management and alliance contracting are used in South African construction projects, although the former tends to be favoured over the latter.

A construction contract in South Africa could take the form of either a bespoke or a standard-form contract. The Construction Industry Development Board (CIDB), a South African statutory body mandated to promote the delivery capability of the country's construction industry, compels state-owned entities to use standard forms when procuring construction services. The approved CIDB standard form contracts are the International Federation of Consulting Engineers (FIDIC), the New Engineering Contract and the locally developed Joint Building Contracts Committee and the General Conditions of Contract for Construction Works.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risk

With some exceptions, South African project developers (and financiers) typically seek to manage the same set of risks managed by projects developers in other developing markets. These risks generally fall into the following broad categories:

a construction risks;
b operational risks;
c supply risks;
d offtake risks;
e repayment or credit risks;
f political risks;
g currency risks;
h licensing and authorisations risks; and
i dispute resolution risks.

There are South African nuances to the above-referenced risks, to which project developers and financiers of South African infrastructure projects pay specific attention. For example, in relation to currency risks South Africa has a comprehensive exchange control regulatory framework, which, inter alia, regulates all capital flows into and out of the country, and subjects the repatriation of foreign investments and income deriving from such investments (such as dividends, interest and royalties) to approvals by the South African Reserve Bank (SARB). Within the context of publicly procured infrastructure projects, licensing and authorisation risks are compounded by the fact that the tender awards have historically been declared invalid and unenforceable for failure to comply with the applicable public procurement process, which is often opaque to bidders. While reliance on legal counsel opinions could mitigate against this risk, legal counsel are generally reluctant to issue such opinions in the absence of documentation relating to, inter alia, the procuring government institution's authority and capacity to engage in the tender process in compliance with applicable regulations.

Further and unique to South Africa are the broad-based black economic empowerment (B-BBEE) obligations, which a government institution may require the bidders to commit to pursuant to their tender submissions and in the subsequent contract with the government institution. Failure to comply with these obligations may result in the disqualification of the bidder or (as applicable) breach and cancellation of the resultant contract.

B-BBEE is a socio-economic programme endorsed by the Constitution. It is designed to redress the inequalities of apartheid through transformative measures that enhance participation by black people (and certain other designated groups of South Africans) in the South African economy. Transformative measures within the context of publicly procured infrastructure projects may include a requirement that bidders commit to, inter alia, black ownership and management targets for the SPV and its key contractors during the implementation of the project. While the principles underpinning B-BBEE are similar in some respects to local content and development commitments in other African markets, B-BBEE is a more complex and involved programme requiring specialist expertise when structuring tender bids and the resultant contracts with the procuring government institution.

ii Limitation of liability

The SPV in an infrastructure development project is generally incorporated as a limited liability company. Accordingly, with a few exceptions, claims against an SPV do not attach to its shareholders. The lenders restrict the SPV's activities through ring-fenced provisions, which are incorporated into the SPV's constitutive documents. The ring-fenced provisions limit the principal business of the SPV to the implementation of the project, and may further prohibit it from incurring additional indebtedness, granting loans and guarantees and imposing encumbrances over any of the project's assets other than those agreed in the finance documents with the project lenders.

Contractors generally do not accept open-ended liability under their construction contracts. They require that their liability for damages under these contracts be subject to a total liability limit, and that sub-limits apply to different types of damages they may incur (e.g., delay and performance). Consistent with the FIDIC standard-form contract, liability for third-party indemnities and intellectual property infringement claims do not fall within these limits. Contractors limit their liability further by excluding indirect, special and consequential damages.[5]

5 Special damages are those that result from a breach of contract, which are ordinarily considered in law as being too remote to be recoverable, unless the parties actually contemplated that such damages could result from a breach of the contract.

Construction contractors appointed to larger publicly procured infrastructure projects, particularly those being developed under REIPPPP and PPP agreements generally insist on the inclusion of *force majeure* provisions in their respective construction contracts. *Force majeure* provisions are generally enforceable under South African law.

iii Political risks

Under REIPPPP's template implementation agreement, a government default includes expropriation or nationalisation of a material part of a power station or shares of an SPV, while the template PPA defines *force majeure* as including war, civil war, armed conflicts or terrorism. The occurrence of these political risks results in compensation for the SPV. Similar protections are provided for under the standardised PPP agreement.

Political risk cover can also be obtained from commercial insurers (such as Lloyd's and AfriExim), export credit agencies from countries where goods and services for the relevant project are being sourced, and the World Bank's Multilateral Investment Guarantee Agency (MIGA). MIGA cover has not been widely used in South African project financings.

The right to property is a fundamental right enshrined in the Constitution, which provides that no persons (both South African citizens and foreigners) may be deprived of property except in terms of the law of general application, and that no law may permit arbitrary deprivation of property. Laws may only provide for expropriation for a public purpose or in the public interest, and expropriation must be subject to compensation, the amount of which is decided or approved by a court. However, as mentioned in Section II, South Africa's expropriation laws are currently in flux after a failed attempt by the country's ruling party to amend these laws to, inter alia, allow for expropriation of land without compensation in certain circumstances.

V SECURITY AND COLLATERAL

The Deeds Registry Act 1937 prohibits a borrower from granting a mortgage bond over immovable property in support of its obligations to more than one creditor through a single mortgage bond, if such obligations arise from different causes. To allow different categories of lenders to a project to benefit from security over the same immovable property, it is necessary to establish a security company (security SPV) independent of the SPV (borrower) and to register the mortgage bond over the immovable property in the name of the security SPV. Typically, the lenders require that all other security interests over the project's assets be transferred to (and, where applicable, registered in the name of) the security SPV. The project lenders receive the benefit to this security indirectly through guarantees, which issued in their favour by the security SPV. Accordingly, upon a borrower default, the lenders make demand against the guarantees issued by the security SPV. The security SPV thereafter claims indemnity from the SPV, which realises the project assets to settle the security SPV's claim against it. The typical security structure required of an SPV, within the context of a project financing, includes:

a mortgage bonds over the immovable property of the SPV registered with the Deed Registry with competent jurisdiction;[6]

6 In South Africa, mortgages can also be registered over long-term leases of real estate. Such security must be registered in the Deeds Registry in the province in which the relevant immovable property is situated.

b notarial bonds over the SPV's movable property registered with the Deed Registry with competent jurisdiction – South African law provides for special notarial bonds over specified movable property of a debtor, and general notarial bonds over all other movable property of a debtor;

c a pledge and cession over the shares in the SPV and any rights attaching to those shares (including shareholder claims);

d a cession in security (akin to a charge) over the SPV's rights in the project, including (but not limited to) its rights under project documents, in authorisations (to the extent permitted at law), to proceeds of the SPV's bank accounts and proceeds of insurance policies and the right to receivables; and

e where applicable, a deed of hypothecation of patents, trademarks and designs registered with the Commission of Intellectual Property and Companies.

There are no formalities prescribed for a cession in security. In relation to a pledge and cession in security over shares, the only formal requirement relates to uncertificated shares (which includes all shares listed on a securities exchange); in addition to the execution of the pledge and cession in security, the securities account of the SPV must be appropriately notated in terms of the Financial Markets Act 2012. Where the pledge and cession in security over shares relate to certificated shares, the execution of the pledge and cession in security agreement suffices for the purposes of creating the relevant security.

If the security over movable and immovable assets needs to be registered, which is the case for mortgage and notarial bonds, then the security over such assets only constitutes real security upon registration of the relevant bonds; the title to the asset remains with the SPV, subject to the lenders' security interest over such asset.

Project finance structures in South Africa incorporate step-in rights, which are generally housed in direct agreements and are for the benefit of the lenders and their respective facility agent. Step-in rights allow the lenders (or its facility agent) to step into the shoes of the SPV under a project document in circumstances where the SPV's counterparty has become entitled to terminate the relevant project document, thereby giving the lenders (through their agent) the opportunity to cure an SPV default and avert the termination of the relevant project document.

VI BONDS AND INSURANCE

Credit support is often required of the project sponsors (primarily in relation to their equity commitments), the project's off-takers (to mitigate credit risk attaching to their purchase commitments) and the parent companies of the EPC and O&M contractors (to mitigate against performance risk under the EPC and O&M contracts, respectively). Such credit support may take the form of a corporate guarantee or suretyship or, depending on the lenders' requirements, on-demand bank guarantees, insurance policies or letters of credit. Suretyships and guarantees do not give any preference to a creditor on insolvency of the grantor of the instrument.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

A creditor holding security in the form of a mortgage bond or a general notarial bond must apply to court for an order authorising the Sheriff of the High Court to attach the debtor's assets subject to that bond. The creditor perfects its security interest over those debtor assets upon the Sheriff attaching those assets. Thereafter, the secured creditor may sell the assets through a private or public sale and use the proceeds of the sale to discharge its claims against the debtor (as well as the related costs). If a creditor holds security in the form of a pledge, cession in security or a special notarial bond, a court order is not required to perfect the relevant security; the secured creditor may sell the secured assets and apply the proceeds of the sale to discharge the creditor's claim without a court order. A court order is also not required if the debtor and the secured creditor agree that the sale of the secured assets need not go through the judicial execution process. Such an agreement is recognised in law only in relation to movable assets pledged and delivered to the secured creditor, and where such assets are in the possession of the secured creditor at the time it enforces its rights against the debtor.

A creditor is prevented from enforcing its claims against a debtor after business rescue proceedings against that debtor have commenced business rescue proceedings can be initiated by the board of the distressed debtor filing a board resolution with the High Court, or through the High Court granting an order to this effect against an appropriate creditor or shareholder application to the High Court. Once a debtor is placed into business rescue, it is obliged to appoint a business rescue practitioner, which assumes control of the debtor and put together a business rescue plan for approval by its creditors. A business rescue practitioner is authorised to suspend any of the debtor's obligations to creditors during the period of the business rescue. The business rescue practitioner is also empowered to apply to the High Court to cancel any terms of a contract that, in the circumstances, are unjust or unreasonable.

A creditor is prohibited from realising any security it holds over movable or immovable property once insolvency proceedings against its debtor have commenced. The creditor is obliged to hand over the property it holds to the liquidator of the debtor's insolvent estate for realisation. A few exceptions to this rule are set out in the Insolvency Act 1936. For instance, if the creditor is a secured creditor, it may lawfully sell the secured movable property it holds and pay the proceeds realised from that sale to the liquidator; however, the liquidator is only obliged to use the proceeds of the sold movable property to settle the secured creditor's claim if the claim is proved and admitted against the debtor's estate.

In addition to secured creditors, the Insolvency Act recognises preferent and concurrent creditors. The preferent creditor, like the concurrent creditor, does not hold security to support its claims; however, the Insolvency Act grants priority to the preferent creditor for payment of its claims over the claims of the concurrent creditor. The concurrent creditor is only paid after both the secured and preferent creditors have been paid. Not all creditors holding security are secured creditors. If a creditor has not taken possession of a debtor's assets or if a creditor has a general notarial bond that is yet to be perfected (as discussed above), the creditor has a preferent claim that will only be settled after the claims of other secured and preferent creditors are settled. As noted in Section VI, suretyships and guarantees do not give any preference to a creditor on insolvency of the grantor of the instrument – the guarantor is a concurrent creditor.

The Insolvency Act provides for the setting aside of certain transactions entered into by an insolvent debtor prior to, or after, the liquidation, as well as clawback rights in favour of the debtor's insolvent estate. If an insolvent debtor disposed of assets without value (e.g., if it made a donation), the High Court can set aside the transaction if, immediately after the disposal, the debtor's liabilities exceeded its assets (the insolvency trigger). The insolvency trigger could have occurred either within two years of the liquidation or more than two years before the liquidation; however, in relation to the former, no insolvency trigger results if the person claiming under or benefiting from the disposition proves that the assets of the debtor exceeded its liabilities immediately after the disposition. The High Court can also set aside a disposition of property made at least six months prior to a debtor's liquidation if that disposition had the effect of preferring one of the debtor's creditors over another and resulted in an insolvency trigger, unless the person in whose favour the disposition is made proves that the disposition was made in the ordinary course of business, and that it was not intended to prefer one creditor above another. The High Court may set aside the improper disposition transactions described above and authorise the liquidator to recover the assets disposed or the value thereof at the date of the disposition (whichever is higher). The Insolvency Act also provides for the setting aside of collusive transactions entered into between the insolvent debtor and any other person prior to the insolvency, if the debtor in collusion with the other person disposed of the debtor's assets in a manner that had the effect of prejudicing the debtor's creditors or preferring one of its creditors above another. Any person who is a party to a collusive disposition is liable to make good any loss caused to the insolvent estate, and if such a person is also a creditor, he or she will also forfeit his or her claim against the insolvent estate.

Certain security not registered within a hardening period is invalid. The Insolvency Act provides that if a debtor is liquidated within six months of a special notarial bond or a mortgage bond being registered, the security is invalid. There is an exception to this general rule: if the assets secured by a special notarial bond or a mortgage bond had been secured for at least two months prior to the registration of the relevant bond, the security is valid.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

If a project involves land development, which is often the case with infrastructure projects, inevitably the developer must conduct an environmental impact assessment (EIA) and secure an environmental authorisation to undertake the proposed development in terms of the National Environment Management Act 1998 (NEMA). In a nutshell, the EIA process under NEMA requires a project developer to do the following:

a conduct either a basic assessment (for activities less likely to significantly affect the environment) or a scoping and EIA process (for activities likely to result in environmental degradation or higher levels of pollution) – the latter processes involve a more thorough assessment of how the proposed development is likely to affect the environment than the former process;

b determine how the proposed development is likely to affect the environment and how the developer could reduce or mitigate against these effects;

c give the public an opportunity to comment on the proposed development, inclusive of the mitigation measures proposed to deal with the effects on the environment; and

d provide the government institution charged with making a decision on an application for environmental authorisation with key information to help it make a decision.

Other licences and permits required for infrastructure projects vary depending on the nature of the projects. Some of the other key environmental permits typically required for infrastructure projects include:

a atmospheric emissions licences under the National Environmental Management: Air Quality Act 2004;

b waste management licences under the National Environmental Management: Waste Act 2008;

c water use licences in respect of certain water use activities under the National Water Act 2008;

d biodiversity permits under the National Environmental Management: Biodiversity Act 2004 in respect of designated activities that may affect protected species and bio-prospecting; and

e permits for the undertaking of certain activities affecting heritage resources under the National Heritage Resources Act 10 1999.

ii Equator Principles

Most of South Africa's commercial banks have adopted the Equator Principles and will oblige the SPV to adhere to them in the implementation of the relevant infrastructure project. Through the use of the pass-through principles, the SPV may oblige other project participants, such as the O&M and EPC contractors, to comply with the Equator Principles (or certain aspects thereof) in the implementation of the relevant infrastructure project.

iii Responsibility of financial institutions

There are divergent views within the market as to whether lenders could be held liable for their indirect contribution towards environmental pollution and degradation caused by the projects they funded. These views remain untested by South African courts with competent jurisdiction.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs have been part of the project finance landscape for over two decades, although fewer PPPs have come to market in the past few years. As noted in Section II, the South African government plans to change that, particularly within the water and sanitation sector.

Depending on the nature of the procuring government institution, a PPP agreement could be subject to either the municipal PPP or the national PPP legislative framework. The latter deals with PPP agreements entered into with national and provincial state departments and state-owned entities, while the former regulates PPP agreements entered into by municipalities and municipal-owned entities. The national PPP legislative framework (when compared with its municipal counterpart) is more comprehensive and involves protracted processes. The discussion that follows is based on South Africa's national PPP legislative framework.

PPPs at national level are primarily regulated by National Treasury Regulation 16 under the Public Finance Management Act 1999 (PFMA) and administered by National Treasury. This Regulation incorporates a PPP Manual and Standardised Provisions for the PPP agreement. The PPP Manual outlines, inter alia, how PPPs must be initiated and how the various stages of the procurement process must be implemented. It further details the various National Treasury approvals required at various milestones of the PPP development process. The Standardised Provisions set out the clauses required in each PPP agreement, with annotations as to what each of the clauses seeks to achieve and under what circumstances deviations to these clauses are permissible. All institutions undertaking PPPs require approval from the National Treasury at different stages of the PPP procurement process. During the procurement process, the relevant PPPs are assessed for value for money, affordability and optimal risk transfer.

The PPP procurement process entails the advertising of a request for qualification (RFQ) calling interested bidders to download copies of the RFQ and attend a public briefing. This process is designed to introduce the project to the market and assess interest therein. Responses to the RFQ are evaluated and potential bidders are qualified to respond to a request for proposal (RFP). Bidders are given access to a data room through which they can access pertinent project information and documentation for their respective due diligence investigations. As part of their bid response, bidders must mark-up the draft PPP agreement included in the RFP. A preferred bidder is selected from the bidders and is invited to enter into negotiations relating to the PPP agreement; at times, two or more bidders may be required to provide their best and final offer before a preferred bidder is selected.

There are various types of infrastructure development PPP projects based on the contractual arrangements involved, including:

a design, finance, build, operate and transfer;
b design, finance and operate; and
c design, build, operate and transfer.

ii Public procurement

Section 217 of the Constitution provides that whenever the South African government contracts for goods and services, it must do so in a manner that is fair, equitable, transparent, competitive and cost-effective. The PFMA and the Municipal Finance Management Act 2003 (MFMA) establish a framework for state procurement in line with Section 217. The latter deals with procurement by municipalities and municipal-owned entities, while the former deals with procurement by national and provincial government departments, and state-owned entities. Supply chain management regulations have been issued under both the PFMA and the MFMA. These regulations are detailed and provide for tender processes distinct from those applicable to PPPs; these processes vary depending on the procuring institution and the procurement requirements. B-BBEE is an important criterion for pre-qualification and tender awards (see Section IV.i). Tender awards constitute administrative action, which can be challenged on a review application to the High Court on the grounds that the action was unlawful, irrational, unreasonable or procedurally unfair.

iii PPP contingent liabilities

PPP contingent liabilities are liabilities that the South African government incurs in terms of a PPP agreement when that agreement is terminated. Under certain circumstances, a PPP agreement will provide that the procuring government institution is obliged to compensate the private party if the PPP agreement is terminated before its expiry date. There are various categories of PPP contingent liabilities, depending on whether the termination is the result of private-sector default, government default or *force majeure* – an event beyond either party's control.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The South African government encourages foreign direct investment and provides via its Department of Trade and Industry a range of investment incentives to foreign investors intend on investing in different sectors of the economy.

Save for work permits for expatriate staff and officers and registration of the foreign company as an external branch (should it elect not to incorporate a South African subsidiary through which it implements the project), there are no special licensing or other requirements for foreign contractors. With the exception of the exchange control restrictions outlined below, there are no restrictions that apply to foreign investors or creditors in the event of a foreclosure of an infrastructure project or an SPV.

South Africa's Exchange Control Regulations are administered by the Financial Surveillance Department (FinSurv) of the SARB and registered banks and financial institutions which the SARB has designated authorised dealers and to whom certain of FinSurv's administrative functions have been delegated. The SARB controls, inter alia, all capital inflows into, and outflows out of, the country. These regulations apply more to residents than non-residents; however, to ensure appropriate treatment of a non-resident investment, non-residents must secure the appropriate exchange control approvals prior to making investments in South Africa to enable the repatriation of their respective investments. For example, should the foreign shareholder in a South African company wish to advance a shareholder loan to the South African company, the foreign shareholder must obtain exchange control approval upfront from the SARB. Without such approval, the South African company may not accept such loan. If the South African company accepts the loan without such approval, it is prohibited from repaying the foreign shareholder's loan.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific rules or requirements, and South Africa does not have a dedicated forum (court or otherwise), for disputes relating to the development or financing of infrastructure projects. In the absence of a written agreement to the contrary, the default position is that disputes relating to such projects are dealt with by a court with competent jurisdiction.

The choice of foreign law as the governing law for any of the project documents would generally be recognised by South African courts, unless the entry into and performance of the documents would be contrary to public policy and the South African Constitution.

ii Arbitration and ADR

Arbitration and other forms of alternative dispute resolution (ADR) are used to resolve commercial disputes in South Africa, including disputes relating to the development and financing of infrastructure projects. Adjudication is also used as a form of ADR within the context of construction contracts.

Through the International Arbitration Act 2017, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) (the Model Law) applies in South Africa to international commercial disputes, which state departments and functionaries have agreed to subject to international commercial arbitration in terms of an arbitration agreement. The International Arbitration Act further provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

South Africa is yet to accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and, considering the dispute resolution provisions of the Protection of Investment Act 2015, it is unlikely to do so in the near future. The Protection of Investment Act does not provide for compulsory international arbitration for the resolution of investor–state disputes involving the South African government; currently, international arbitration is used at the government's discretion.

XII OUTLOOK AND CONCLUSIONS

Project developers and financiers are cautiously optimistic about their prospects in 2022. While the South African government's world-class renewable energy procurement programme is being accelerated, project developers and financiers are concerned that policy uncertainty, which has being increasingly eroding the country's growth prospects and weakening its credit ratings, could reduce their return of investment. Prospective project financiers may also be concerned about developers' ability to construct and complete infrastructure projects on time and within budget, considering the diminished capacity within the construction sector resulting from construction firms being financially distressed and being placed in business rescue.

These risks, however, could provide opportunities for new investors and existing investors in the market who have an appetite for the policy risks, and who are able to leverage construction capacity within and outside South Africa to deliver on the South African government-driven infrastructure projects. For these investors, the private sector's increased attention on embedded (self) generation power plants may present further opportunities.

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Appendix 1

ABOUT THE AUTHORS

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Deon Govender focuses his practice on project development and corporate and project finance transactions across Africa, with a particular emphasis on southern Africa. His experience ranges from advising on the development and financing of renewable energy and thermal power projects to various other infrastructure assets in the transport and telecommunications sectors. Deon's experience additionally includes advising on financing independent power producer projects under the South African government's renewable energy independent power producer procurement programme.

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